IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 1050 OF 1996

Dilip Kumar G.Badlani)
Proprietor of M/s. BEEKAY)
PHARMACEUTICALS having Its head)
office at 23/5, Chewool Wadi, Kolbhat)
Lane, Kalbadevi, Bombay 400 002.)..Plaintiff

Versus

1. Maharashtra State Financial)
Corporation)
a body incorporated under the)
State Financial Corporations Act,)
1951, having its office Formerly)
at New Excelsior Building,)
A.K.Nayak Marg, Fort, Bombay-)
400 001 now at United India)
Building, P.M. Road, Fort,)
Mumbai 400 001.)

2. M/s. Ray Pharmaceuticals,)
having its head office at)
5/1, Sher-E-Punjab Colony,)
Mahakali Caves Road, Andheri)

(East), Mumbai 400 093.)

Dr. D.R.Talankar for Plaintiff.

Dr. A.K.Barthakur for Defendants Nos.1 & 2.

Mr. J.B.Patel for Defendant No.3.

CORAM: S.K.SHAH,J.

JUDGMENT RESERVED ON: 3.8.2006

JUDGMENT PRONOUNCED ON:5.9.2006

ORAL JUDGMENT:

1. This is Defendant No.1's Notice of Motion to frame the issue with regard to the Suit being barred by res judicata under Section 11 of the Code of Civil Procedure and another issue with regard to the jurisdiction of this Court to try the suit and for deciding both the issues as preliminary issues. But during the course of hearing the Defendant's Counsel has restricted to the issue of res judicata only. Accordingly, the said issue was framed and is being tried as preliminary issue and arguments are heard.

2. The Plaintiff is a proprietor of M/s. Beekay Pharmaceuticals having its office at Kalbadevi, Mumbai. The Plaintiff is a small-scale industrial unit and is engaged in the manufactrue and production of drugs at his factory premises at 17/9, MIDC Industrial Area, Taloja, District Raigad. The Defendant No.1 is Maharashtra State Financial

Corporation and Defendant No.2 is the purchaser of the said factory.

3. The Plaintiff had borrowed a loan of Rs.8,70,000/- from the Defendant No.1 - Corporation. By way of security, the aforesaid property was mortgaged by the Plaintiff to Defendant No.1 Corporation under deeds of mortgage executed on 17.12.1981 and 30.9.1983 creating first charge in favour of Defendant No.1 Corporation. Since the Plaintiff failed to repay the entire amount to Defendant No.1 Corporation, the Corporation sold the aforesaid property of the Plaintiff to Defendant No.2, the purchaser, under a Sale Deed dated 8.2.2001.

4. It appears that the Plaintiff had also taken loan from State Bank of India and created a mortgage on the same property as aforesaid by way of a second charge in favour of State Bank of India. Since the Plaintiff failed to pay the loan given to him by State Bank of India, State Bank of India had filed the proceedings for recovery before the Debt Recovery Tribunal (DRT), Mumbai, being O.A. No.339/99.

5. In the meantime, there was an attempt to sell the suit property by defendant No.1 and the agreement to sell dated 28.12.1995 was entered into. The same was

challenged by the plaintiff by the present suit. By an interim order passed by this Court, the sale was set aside on technical grounds. Thereafter, the defendant No.1 again attempted to sell the suit property. The plaintiff, therefore, took out Notice of Motion No.897 of 1996 seeking an order restraining the defendant No.1 from proceeding with the sale of the suit property. However, that Notice of Motion was dismissed by this Court by an order dated 3.8.1998. It appears that thereafter the defendant No.1 sold the property by a Deed of Assignment & Sale dated 8.2.2001. As such, the plaintiff took out Notice of Motion No.2705 of 2001 seeking quashing and setting aside the said sale. However, this Court by an order dated 5.11.2001, dismissed the said Notice of Motion observing that the plaintiff was merely interested in launching malicious proceedings for harassing the defendants and that the plaintiff does not deserve indulgence from the Court and awarded costs of Rs.5,000/- against the plaintiff. The plaintiff aggrieved by the said order, filed Appeal No.1210 of 2001 before the Division Bench of this Court. The Division Bench of this Court by an order dated 28.3.2002 dismissed the said Appeal. The plaintiff again attempted to get relief from the Division Bench by filing a Review Petition, being Review Petition No.28 of 2002, but the same was also dismissed by an

order dated 11.3.2003. The plaintiff thereafter took out Notice of Motion No.14 of 2004 before the Division Bench alleging that the concerned officer of the defendant No.1 made false statements to this Court and the said officer should be prosecuted for committing perjury. However, that Notice of Motion came to be withdrawn and as such, came to be dismissed as withdrawn by an order dated 22.10.2005.

6. In O.A. No.339 of 2004 that was filed by S.B.I. against the plaintiff in the Debt Recovery Tribunal, the defendant No.1 was not a party. As stated above, O.A.No.339/99 was filed by S.B.I. for recovery of their dues against the plaintiff. Initially, the defendant no.1 was not a party to the proceedings before the D.R.T. By Applications, Exhibits 63 & 73 in the said O.A. No.339/99 sought to join the defendant No.1 as a party in the said proceedings and also sought relief of setting aside the sale of the suit property dated 8.2.2001. Accordingly, defendant No.1 was joined as a party to that proceeding. The sale dated 8.2.2001 was sought to be set aside on various grounds that the defendant no.1 had illegally sold the suit property for a meagre amount of Rs.6 lakhs; that there was correspondence between the plaintiff and the defendant No.1 with regard to the illegal disposal of the suit property by defendant

No.1; that earlier the suit property was sold for a price of Rs.35 lakhs and after illegal auction the said sale was withdrawn by the defendant no.1; that the factory was worth more than Rs.75 lakhs to Rs.1 crore and it was sold at a meagre price of Rs.6 lakhs; that sale and handing over possession was surreptitiously and without informing the S.B.I. who had a second charge on the suit property; that the defendant no.1 agreed to keep status quo in the joint meeting at Udyog Mitra dated 22.2.1998 etc. The relief sought in these Applications was that the defendant No.1 should be directed to cancel and/or witrhdraw the said sale dated 8.2.2001 and to deposit any remittance received so far from the intending purchaser with a further declaration that the sale dated 8.2.2001 was null and void.

7. Those Applications were resisted by defendant No.1. After hearing both sides, the learned Tribunal dismissed both the Applications by an order dated 19.7.2004 which was exhaustive dealing with all aspects of the matter and particularly holding that although the defendant No.1 had given notice to the plaintiff about the suit property being sold, the plaintiff neglected to act on it and, therefore, sale was being completed legally under the provisions of Maharashtra State Financial Corporation act. The

Tribunal further clearly observed that it had not noticed a single lacuna on the part of the defendant no.1 in selling the suit property. The said order was challenged by the plaintiff before D.R.A.T. by Misc. Appeal No.271 of 2004. The D.R.A.T. by an order dated 22.12.2004, dismissed the said Appeal considering all the aspects of the matter and specifically observing that there was not a scrap of paper produced to substantiate the plaintiff's contention that the valuation of the suit property was Rs.1 crore. The said decision of the D.R.A.T. was challenged by way of a Writ Petition, being Writ Petition No.440 of 2005 in this Court. The said Writ Petition came to be dismissed by this Court by an order dated 4th April, 2005. The observation of this Court were as under :-

> "2. We do not find any error in the order passed by the Appellate Tribunal. It is a well reasoned order giving reasons and relying upon the law which holds the filed. Petition is rejected."

8. The present Notice of Motion is, therefore, taken out by the defendant No.1 for framing preliminary issue as regards the suit being barred by res judicata and for trying it to be as preliminary issue under Order 14 Rule 2(2) of the C.P.C. alleging that this

issue is the issue of law alone and the Suit can be dismissed on this ground alone.

9. The plaintiff has opposed this Notice of Motion by filing an affidavit-in-reply mainly on the ground that the defendant No.1 had completed the sale inspite of the fact that there was stay from the organisation of Udyog Mitra and from Hon'ble Minister for Industries. It is further contended that the procedure as required under Section 29 of the MSFC Act was not followed and guidelines were not followed and that there was no fair deal and transparency in the transaction. It is also contended that the sale was by private treaty and that although the State Bank was having second charge, the State Bank was not consulted and that rehabilitation and OTS was not considered which was submitted as per RBI guidelines.

10. I have heard Counsel on both sides. The learned Counsel for the Defendant No.1 submits in support of the Notice of Motion that the issue that was raised before the D.R.T. was the same. The issue was whether the sale of suit property by Defendant No.1 was legal or otherwise and the sale was required to be set aside. He submits that the same issue has been raised in the suit. He further submits that though the suit has been filed prior in point of time, the

issue has been decided finally in the proceedings before the D.R.T. He submits that the order passed by the D.R.T. on 19.7.2004 has been not only confirmed by the D.R.A.T. on 22.12.2004, but also by a Division bench of this Court in Writ Petition No.440 of 2005 by order dated 4.4.2005. He, therefore, submits that the same issue is barred by res judicata.

11. As against this, the learned Counsel for the plaintiff submits that the issue has not been finally decided in the D.R.T. proceedings. He submits that the plaintiff had given an application for cross-examination of the witness who had filed an affidavit in support of the defendant no.1's claim before the D.R.T., but that was refused. He further submits that the number of contentions as have been specified above were not raised and considered in the D.R.T. proceedings and, therefore, the said issue in the suit will not be barred by the res judicata under Section 11 of the C.P.C.

12. The relevant provisions of Section 11 as are relied upon by the defendant no.1 in support of the Notice of Motion are as under :-

. "11. Res judicata - No Court shall try any suit or issue in which the matter directly and

substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

The learned Counsel for the defendant No.1 has mainly relied on the Explanation VIII to section 11 which reads as under :-

. "Explanation VIII - An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised."

The Explanation VIII therefore makes it clear that the issue heard and finally decided by a Court of limited jurisdiction (D.R.T. was in this case) shall operate res judicata in subsequent suit. No doubt, the issue as to the validity of the sale dated 8.2.2001 was raised before the D.R.T. by the plaintiff himself by getting the defendant no.1 joined in that proceeding.

Needless to say that the D.R.T. had jurisdiction to decide that issue, it could be said to be a limited jurisdiction and the said issue was finally decided not only by the D.R.T. but by D.R.A.T. and finally by this Court in Writ Petition No.440 of 2005.

13. It is further submitted that O.A. No.339 of 1999 was mainly between S.B.I. and the plaintiff herein and the defendant No.2 was not a party to it. However, this submission is not acceptable as the plaintiff himself got the defendant No.1 added as party to O.A. No.339/99 and specifically challenged the sale of the suit property belonging to the plaintiff by the defendant No.1 by a deed of assignment dated 8.2.2001. Therefore, it cannot be said that the issue was not between the same parties in the proceedings before the D.R.T. as the parties to the present suit. The issue that was raised before the D.R.T. was between the plaintiff and the defendant no.1 who are parties herein also. The issue was also directly and substantially in issue before the D.R.T. and between the same parties and the issue as regards the validity of the sale of the suit property is also the issue directly and substantially involved in this suit also. The same issue having been finally decided right upto this Court in the proceedings of O.A. No.339/99, it would be barred by

res judicata in this suit. In fact, all the relevant contentions were raised by both the plaintiff and the defendant in the Applications, Exhibits 64 and 73 in O.A. No.339/99. All those contentions were considered by the D.R.T. and the issue was decided. The plaintiff had challenged that finding before the D.R.A.T. as also before this Court by way of Writ Petition and both the Appeal and the Writ Petition have been decided against the plaintiff confirming the decision of the D.R.A.T. on this issue holding that the sale of the suit property by defendant no.1 was legal and proper.

14. It is not necessary that the issue should have been raised between the same parties in a suit filed earlier in point of time. The Apex Court in the case of **Satyadhyan Ghosal and others vs. Smt. Deorjin Debi & Anr.** reported in AIR 1960 SC 941, has clarified the principle of res judicata as under :-

. "7. The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter - whether on a question of fact or a question of law - has been decided between two parties in one

suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of respondent judicata is embodied in relation to suits in S.11 of the Code of Civil Procedure; but even where S.11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original courts as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.

8. The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter against at a subsequent stage of the same proceedings."

Therefore, the use of the word "suit" in section 11 also covers the previous proceeding or litigation and bars subsequent suit or proceeding between the same parties.The principle of res judicata in Section 11 of C.P.C. is also explained by the Apex Court in the

case of **Kunjan Nair Sivaraman Nair vs. Narayanan Nair & Ors. reported in (2004) 3 SCC 277 as under :-**

> "13. Section 11 contains the rule of conclusiveness of the judgment which is based partly on the maxim of Roman jurisprudence "interest reipublicae ut sit finis litium" (it concerns the State that there be an end to law suits) and partly on the maxim "nenmo debet bis vexari pro una et eadem causa" (no man should be vexed twice over for the same cause). the section does not affect the jurisdiction of the court but operates as a bar to the trial of the suit or issue, if the matter in the suit was directly and substantially in issue (and finally decided) in the previous suit between the same parties litigating under the same title in a court, competent to try the subsequent suit in which such issue has been raised.

Similarly, in the case of **The Workmen of Cochin Port Trust vs. The Board of Trustees of the Cochin Port Trust and Anr.** reported in AIR 1978 SC 1283, the Apex Court has enunciated the same principle of res judicata as under :-

> "8. It is well-known that the doctrine of res

judicata is codified in S.11 of the Code of Civil Procedure but it is not exhaustive. Section 11 generally comes into play in relation to civil suits. But apart from the codified law the doctrine the doctrine of res judicata or the principle of res judicata has been applied since long in various other kinds of proceedings and situations by Courts in England, India and other countries. The rule of constructive res judicata is engrafted in Explanation IV of S. 11 of the Code of Civil Procedure and in many other situations also principles not only of direct res judicata but of constructive res judicata are also applied. If by any judgment or order any matter in issue has been directly and explicitly decided the decision operates as res judicata and bars the trial of an identical issue in a subsequent proceeding between the same parties. The principle of res judicata also comes into play when by the judgment and order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implication; then also the principle of res judicata on that issue is directly applicable. When any matter which might and ought to have been made a ground for defence or attack in a former proceeding but was not so made, then such

> a matter in the eye of law, to avoid multiplicity of litigation and to bring about finality in it is deemed to have been constructively in issue and, therefore, is taken as decided."

This makes it clear that the issue as to the validity of the sale of suit property by defendant No.1 was finally decided in the D.R.T. proceedings as was raised by the plaintiff against the defendant NO.1 who were parties to the proceeding before the D.R.T. In fact, it is at the instance of the plaintiff that defendant No.1 was added as party in the suit when the plaintiff himself raised the issue of validity of the same raising all the contentions that were available to him which are substantially same in this suit and, therefore, that issue will be barred by res judicata in this suit.

15. Merely because some additional points are tried to be raised in this suit, it is not open for the plaintiff to once again agitate the same issue as he himself raised before the D.R.T. and got it finally decided right upto this Court. Under these circumstances, the Notice of Motion taken out by the defendant No.1 raising the issue of res judicata shall have to be allowed.

16. It is clear that under Order XIV Rule 2 of C.P.C. such issue can be decided as a preliminary issue if the issue is not mixed question of law and fact, but the question of law alone. Under Order XIV Rule 2(2), when the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it is open for the Court to decide such issue as to clause (b) a bar to the suit created by any law for the time being in force could be decided as preliminary issue by postponing the raising of other issues. In this suit, the only issue is about validity of the sale. although initially the agreement for sale dated 28.12.2005 was challenged by way of amendment, the validity of the sale dated 8.2.2001 has been challenged. As observed by the Apex Court in the case of **Major S.S. Khanna vs. Brig. F.J.Dillon** reported in AIR 1964 SC 497, the suit will have to be tried as preliminary issue. The observation is as under :-

> "Under O.14 R.2 where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have

been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the Court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the Court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the Court; not to do so, especially when the decision on issues even of law depends upon the decision of issues of fact, would result in a lop-sided trial of the suit."

17. Under these circumstances, the issue as regards the suit being barred by res judicata under Section 11 of the Code of Civil Procedure is answered in the affirmative and the Suit is, therefore, dismissed with costs.

Certified copy expedited.

(S.K.SHAH,J.)